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OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO: 08-727

IN THE SUPREME COURT OF THE UNITED STATES

Lester Patrick

V.

James B Peake, M.D. Secretary
United States Department of Veteran Affairs

Bobbie Montoya

On Rehearing of Petition for Writ of Certiorari
To The Ninth Circuit of Appeals

Lester Patrick
9522 Bismark Place
Stockton, Ca. 95209
209-957-2937

QUESTIONS PRESENTED

The McDonnell Douglas model when applied to desperate treatment cases requires an agency to articulate a legitimate and nondiscriminatory reason for its actions in cases whereby discrimination is alleged. The Department of Veteran Affairs has articulated a reason for its actions in this case; but when tested against the McDonnell Douglas model the legitimate nondiscriminatory reason doesn't hold up.

Due to the judgment of the district court and the 9th Circuit Court of Appeals there are two critical questions stemming from this case that still need to be answered by the Supreme Court.

The following questions are being presented to the Court for clarification.

1. Whether the district court is required to give the jury instructions concerning pretext in discrimination cases?

2. Is a federal employee required to provide additional evidence of discrimination when the agency's proffered reason involves a procedure that violates employment regulations established for federal agencies?

PARTIES TO THE PRECEEDING

Petitioner is Lester Patrick. He is plaintiff in the District Court and the appeallee in the Court of Appeals. Plaintiff brings this action on his own behalf.

Respondents are Dan Maloney, who defended the case in District Court, and Bobbie J. Montoya who defended the case in the Court of Appeals.

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MOTION FOR REHEARI NG OF PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a rehearing of his writ of certiorari to review the judgment of the United States of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the Ninth Circuit Court of Appeals at Ex. 13. The decision of the District Court is reported at (Ex. 4) Decision of United States Supreme Court at (Ex. X)

JURISDICTION

The judgment of the Court of Appeals was entered on Aug. 27, 2008. (Ex. 8). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The judgment of the Supreme Court was entered on Jan. 21, 2009.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Title VII of the Civil Rights Act of 1964, Civil Rights Act of 1964 SEC. 2000e-2. *[Section*

2 Civil Rights Act of 1866, United States Code, .Title 42, § 1982;

GROUNDS FOR REHEARING

This rehearing is being requested on the grounds that the Supreme Court has ruled that courts must instruct jurors that if they disbelieve an employer's explanation they may-but need not-infer that the employer's true, motive was discriminatory. The district court in plaintiff's case failed to instruct the jury on this instruction as required.

Nationally, the district courts are split on this issue and requires a ruling from the Supreme Court on whether it is mandatory for courts to give instructions on pretext.

Plaintiff is also requesting a rehearing on the grounds that the defendant never presented a legitimate nondiscriminatory reason to address its unexplained actions that gave rise to this complaint. Accordingly, plaintiff should not have been required to give additional evidence to disprove defendant's articulated nondiscriminatory reasons.

This case present two questions. One asks "whether the district court is required to give the jury an instruction concerning pretext in a discrimination case"

A second question asks if an employee in a race discrimination case is required to provide additional evidence of discrimination when the agency's proffered reason involves a procedure that clearly violates its own internal policies and federal employment regulations governing promotion procedures for federal agencies?

I. Factual Background

A. Plaintiff

Plaintiff is a civilian GS-13 Telecommunications Specialist for the Department of Veteran Affairs, who filed a suit, in pro se, under Title VII, 42 U.S.C. § 2000e-16, alleging that the VA discriminated against him when he was not selected and promoted to a GS-14 Lead Computer Specialist.

B. Disparate Treatment Claims

Disparate Treatment

Disparate treatment claims must proceed in accordance with the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and its progeny. A discrimination complainant must first establish a prima facie case of disparate treatment. In general, a plaintiff must present evidence of "actions taken by the employer from which one can infer, if such actions remain unexplained , that it is more likely than not that such action was based upon race or another impermissible criterion." Gay v. Waiters' Union, 694 F.2d 531, 538 (9th Cir. 1982) (citation and internal quotation marks omitted).

Upon these showings, the burden shifts to the defendant to produce some evidence demonstrating a legitimate, nondiscriminatory reason for the employee's termination. McDonnell Douglas, 411 U.S. at 802. If the defendant meets this burden of production, any presumption that the defendant discriminated "drops from the case,"

and the plaintiff must then show that the defendant's alleged reason for termination was merely a pretext for discrimination. St. Mary's Honor Ctr. V Hicks, 509 U.S. 502, 507 08(1993). However, the burden of persuasion, as opposed to production, remains with the plaintiff at all times Id. at 511.

A plaintiff may prove pretext' either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.' " Raad v. Fairbanks North Star Borough School Dist., 323 F.3d 1185, 1196 (9th Cir.2003) (quoting Burdine., 450 U.S. at 256).

The evidence proffered can be circumstantial or direct. Fodwin v. Hunt Wesson Inc. 150 F.3d 1217, 1221-22 (9th Cir. 1998); Stegall v. Citadel Broadcasting Co. 350 F.3d 1061 (9th Cir. 203). In disparate treatment case, the plaintiff'must show the employer's intent to discriminate, but intent may be inferred from circumstantial evidence." McGinest v GTE Service Corp., 360 F3d 1103, 1122 (9th Cir. 2004)(citation omotted). Circumstantial and direct evidence should be treated alike. Costa v. Desert Palace, 539 U.S. 90, 123 S. Ct. 2148 (2003). :Circumstantial evidence is not sufficient, but may also be more certain, satisfying and persuasive than direct evidence." Costa, at 2154 (quoting Rogers v. Missouri Pacific R.R. Co. 342 U.S. 500, 508 n.17 (1957).

Plaintiff's Prima Facie Case

Both the Defense and the EEOC agrees that plaintiff has established a prima facie case as follows:

Burden Shifts to Defendant

The burden now shifts to the defendant to demonstrate that it had legitimate nondiscriminatory reasons for selecting Jerry Taylor over the plaintiff.

The defendant articulated several legitimate nondiscriminatory reasons:

The Supreme Court has held that it is sufficient for an employer to simply articulate its "legitimate, nondiscriminatory reason' for the hiring decision in order to rebut plaintiff's prima facie case. Board of trustees of Keene State College, et al., v. Sweeny, 439 U.S. 24 (1978).

Evidence of Pretext

Plaintiff must show that the defendant's alleged reason for termination was merely a pretext for discrimination. St. Mary's Honor Ctr., 509, U.S. at 507-08. "Plaintiff may prove pretext either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that he employer's proffered explanation is unworthy of credence." Raad v. Fairbanks North Star Borough School Dist., 323 F.3d 1185, 1196 (9th Cir.2003) (quoting Burdine, 450 U.S. at 256). McDonnell Douglas requires that plaintiff raise a genuine factual question whether, viewing the evidence in the light most favorable to plaintiff, defendant's proffered reasons are pretextual.

II. PROCEEDINGS BELOW

A. The United States Supreme Court

On Dec 16, 2008, plaintiff filed a writ of certiorari with the U.S. Supreme Court. On Jan 21, the motion was denied. **(Exhibit xx)**

B. Motion for Rehearing Before the Full Court

Because several questions surrounding the issue of this case are still unclear and the fact that these questions when answered will have a major impact on employees nationally, plaintiff is requesting a rehearing before the full court.

REASONS FOR GRANTING THE WRIT

The Supreme Court has failed to address the question of whether to mandate a pretext instruction. The pretext instruction represents a unique issue because it describes a permissible inference rather than an obligatory inference.

In civil litigation, courts generally follow the rule that a judge need not instruct the jury on permissible inferences because the average trial contains a virtually unlimited number of possible inferences that the jury may draw from any given piece of evidence.

In most employment discrimination cases in which issues of pretext arise, the defendant will provide all sorts of seemingly legitimate reasons to justify its behavior while the plaintiff will fights to discredit these justifications and prove that the employer acted based on a discriminatory and impermissible motive. However, the plaintiff will rarely, if ever, ferret out any sort of "smoking gun" or affirmative evidence demonstrating

discrimination by the employer. Thus, creating an inference that the employer lied can give rise to the extremely important inference that the employer lied for a particular reason: to cover up a discriminatory purpose.

In addition to the significance of this particular issue, the sheer volume of employment discrimination cases on the federal docket and the need for national uniformity in the litigation of these disputes necessitates Supreme Court resolution of this circuit split.

Three United States courts of appeals have decided to require this jury instruction in employment discrimination cases involving a proof pattern described as the McDonnell Douglas tripartite formula. The Second, Third, and Tenth Circuits require the instruction at trial. Four other U.S. courts of appeals believe the instruction should not be mandatory. Within this group of four, the Seventh and Eleventh Circuits have decided not to require the instruction, while the First and Eighth Circuits have indicated in dicta that they doubt the necessity of the instruction.

There is urgent need for the Supreme Court to rule on whether courts should mandate an instruction on pretext to jurors.

The final step in the proof process represents the crux of the argument to mandate use of the pretext instruction.

Unless the court gives the instruction, a jury might make the same assumption that the Fifth Circuit did in Reeves and assume that the plaintiff must provide additional affirmative evidence beyond a showing of pretext in order to prevail.

The concern that the jury could misunderstand the law governing employment discrimination seems logical, especially after examining a sample instruction that lacks any reference to pretext, such as the one given by the district court in Townsend:

"In order for plaintiff to recover on [his Title VII] claim, he must prove by the preponderance of the evidence that defendant intentionally discriminated against plaintiff, that is, plaintiff's race must be proven to have been a motivating factor in defendant's decision regarding plaintiff's demotion.

It seems entirely plausible, if not probable, that "a rational juror might very well have interpreted such an instruction to require affirmative proof of discriminatory intent." Omission of the pretext instruction therefore creates the possibility that a jury could find for the defendant "because it believe[s] that the plaintiff could not prevail without affirmative evidence that his race was a motivating factor in the challenged employment actions."

The first question being submitted is, **"whether the district court is required to give jurors instructions concerning pretext** in discrimination cases?"

As stated above, in a disparate discrimination case the employee is required to establish a prima facie case of discrimination. The employee is required to present "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such action was based upon race or another impermissible criterion." Gay v. Waiters' Union, 694 F.2d 531, 538 (9th Cir. 1982) (citations and internal quotation marks omitted).

Once that burden has been met, the employer is required to give a legitimate non-discriminatory reason for its actions. The Department in this case has articulated a reason for its actions.

But the articulated reason in response to plaintiff's

prima facie case can never be a legitimate non-discriminatory reason simply because it never produced evidence that explains that the articulated reasons are the reasons for the actions taken. For example, stating that Jerry Taylor had extensive management background does not address why she didn't read plaintiff's application.

According to the McDonnell Douglas standard a plaintiff must present evidence of "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such action was based upon race or another impermissible criterion." Gay v. Waiters's Union, 694 F.32d 532, 538 (9th Cir. 1983) (citations and internal quotation marks omitted)In this case, the defendant never met the burden of demonstrating a legitimate, nondiscriminatory reason for its action. None of the reasons cited by the defendant for its actions explain why Ms Belles didn't read plaintiff's application.

Therefore plaintiff is not required to prove pretext. The second question for the Supreme Court is as follows: **"Is it a requirement that a federal employee provide additional evidence of discrimination when the agency's proffered reason involves a procedure that violates employment regulations established for federal agencies?"**

It is imperative that the court answer this question. Plaintiff submitted to the district court a proposed jury instruction on pretext. **(Exhibit xx)** The instruction was ignored. As a result plaintiff's case was prejudiced because of a lack of the instruction and the inclusion of the instruction that informed the jury that plaintiff was required to prove that he was not promoted because of his Race. (Exhibit xx)

Not including an instruction on pretext was definitely prejudicial because defendant was allowed to argue that plaintiff needed to show pretext but the jury wasn't given an instruction on pretext nor was plaintiff's instruction on pretext given to the jury.

Intentional discrimination has not been defined by the Supreme Court. Consequently jurors are left to figure it out for themselves. This creates a near impossible task for a plaintiff of a discrimination case. Without the instructions, jurors may conclude that a plaintiff cannot prevail by proving pretext alone. Especially when they are given an instruction that instructs them that the plaintiff can only prevail if he proved that the employee's actions are by Race.

THE SUPREME COURT ON PRETEXT

In 1993, the Court issued its opinion in St. Mary's Honor Center v. Hicks, a five to four decision that attempted to clarify some of the issues surrounding the role of pretext in the McDonnell Douglas framework. In Hicks, the Court considered the basic question of whether a plaintiff deserved judgment as a matter of law if the trier of fact disbelieved the employer's nondiscriminatory explanation.

The Court divided "pretext for discrimination" into two parts. To demonstrate pretext, the plaintiff must have "shown both that the reason was false, and that discrimination was the real reason. However the Court emphasized the permissibility of inferring the ultimate fact of discrimination solely from a false explanation by the defendant employer. Although proof of a false explanation by the defendant may therefore help significantly in

proving the employer lied to conceal a discriminatory motive, and sufficiently supports a judgment for the plaintiff, it cannot, by itself, compel a finding for the plaintiff.

Hicks eliminated some of the confusion regarding the application of pretext to defendants in employment discrimination litigation, a dispute continued over the role of pretext in the plaintiff's burden of proof. In Reeves, the Supreme Court unanimously resolved a circuit split involving the "pretext-plus" theory. The pretext-plus theory required additional evidence beyond the prima facie case, rather than a mere rejection of the defendant's nondiscriminatory explanation, to uphold a verdict for the plaintiff. This conclusion ignored the Court's statement in Hicks that a plaintiff's prima facie case combined with rejection of the defendant's explanation **"will permit the trier of fact to infer the ultimate fact of intentional discrimination"** without additional proof.

The Supreme Court clarified this principle in Reeves by eliminating any further use of the pretext-plus standard. Two grounds justify this principle. First, under evidence law, a trier of fact is "entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" Second, in the circumstances of an employment dispute, "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.

Although Reeves firmly established the role of pretext in the overall McDonnell Douglas framework, the courts of appeals remain divided on the issue of whether to require jury instructions about pretext.

The Supreme Court should resolve this circuit split.

APPEALS COURT SPLIT ON PRETEXT

Second Circuit Court of Appeals

One year after the Supreme Court decided Hicks, the Second Circuit became the first appellate court to mandate useof the pretext instruction. In Cabrera v. Jakabovitz, the Second Circuit addressed the inherent difficulties involved in adapting the complex McDonnell Douglas framework to a set of comprehensible jury instructions.The Second Circuit used Cabrera to distill two essential principles from the Supreme Court's decisions in McDonnell Douglas and Hicks. In accordance with its earlier emphasis on simplicity, the court stated the following:

"The jury needs to be told two things: (1) it is the plaintiff's burden to persuade the jurors by a preponderance of the evidence that the apartment (or job) was denied because of race (or, in other cases, because of some other legally invalid reason), [and] (2) the jury is entitled to infer, but need not infer, that this burden has been met if they find that the four facts previously set forth have been established and they disbelieve the defendant's explanation.

Seventh Circuit Court of Appeals

The Seventh Circuit did not read Hicks in this manner when addressing virtually the same issue, however, and declined to require use of the instruction. In Gehring v. Case Corporation, the Seventh Circuit addressed the question of appropriate jury instructions in an employment discrimination case arising under the Age Discrimination in Employment Act (ADEA).

In this case, unlike Cabrera, the plaintiff lost at trial, appealed, and argued that the trial court erred in failing to instruct the jury that it could infer discrimination if it did

not believe the defendant's explanation. The Seventh Circuit noted that, under Hicks, this instruction contains a "correct statement of the law" but declined the opportunity to mandate use of this principle.

Third Circuit Court of Appeals

The Third Circuit was the next federal court of appeals to address this issue, and it expressly aligned itself with the position of the Second Circuit in Cabrera mandating use of this instruction. **In Smith v. Borough of Wilkinsburg, the Third Circuit addressed an issue virtually identical to that considered by the Seventh Circuit in Gehring yet reached the opposite conclusion.** The plaintiff, whose claim arose under the ADEA, argued on appeal that the trial court had committed reversible error in refusing to instruct the jury on pretext. The Third Circuit agreed, and described the serious difficulties plaintiffs face when trying to prove an employment discrimination claim.

The court discussed the McDonnell Douglas tripartite formula and focused, in particular, on "the pivotal role played by pretext in the ultimate decision of discrimination," concluding that the focus of a trial conducted under this formula will invariably be the truthfulness of the defendant's explanation. Upon reaching this conclusion, the Third Circuit explicitly stated that it joined the Second Circuit in requiring the jury instruction on pretext.

Eleventh Circuit Court of Appeals

The Eleventh Circuit considered this issue in Palmer v. Board of Regents. The Eleventh Circuit considered the question of whether the plaintiff experienced prejudice because of the trial court's failure to instruct the jury on pretext. The court cited both the Second Circuit's decision in Cabrera and the Third Circuit's decision in Borough of Wilkinsburg with approval, yet it decided that the trial court had not erred in refusing to give the instruction.

First Circuit Court of Appeals

In Fite v. Digital Equipment Corp. , the First Circuit briefly addressed the plaintiff's claim of error regarding the trial court's refusal to instruct the jury on pretext.

Eighth Circuit Court of Appeals

In Moore v. Robertson Fire Protection District, the plaintiff properly preserved the claim of error, but the Eighth Circuit refused to find an abuse of discretion by the trial court for failing to instruct the jury on pretext. The court based its reasoning on two primary factors.

Tenth Circuit Court of Appeals

In Townsend v. Lumbermens Mutual Casualty Co.,' the Tenth Circuit squarely addressed the growing circuit split, provided the most recent and in-depth analysis of the issue, and decided to mandate use of the instruction in a sharply split decision. Townsend involved an African-American man who sued his former employer for rapidly demoting and then firing him after a decade-long employment relationship. The litigation focused primarily on the issue of whether the defendant insurance company provided a truthful reason for firing Townsend, because he presented impeachment evidence that questioned the veracity of the defendant's explanation. Despite the question of fact surrounding this evidence, the trial court refused to grant Townsend's request to instruct the jury that "if it did not believe Kemper's explanation, it could take this as evidence that Kemper's true motive for terminating him was discriminatory and could on this basis conclude-though it need not do so that Kemper terminated Townsend for a discriminatory reason.On appeal, Townsend argued primarily that this failure to instruct the jury on pretext constituted reversible error.

The Tenth Circuit, made the following ruling:

"We do not hold that a pretext instruction is always required, but rather that it is required where, as here, a rational finder of fact could reasonably find the defendant's explanation false and could "infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."

CLARITY FROM THE SUPREME COURT

It is very clear that the appeals courts are split on this issue. This is an issue of significant national importance that needs to be resolved by the Supreme Court.

CONCLUSION

For the foregoing reasons Plaintiff respectfully requests that the Supreme Court issue a writ of certiorari so that these two questions can be answered, and to remand this case back to district court for a retrial.

Respectfully submitted,

Lester Patrick
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(209) 957-2937

Ex; 15

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, DC 20543-001

JAN 21. 2009

Mr. Lester Patrick
9522 Bismark Place
Stockton, Ca 95209

Re: Lester Patrick
v. Department of Veteran Affairs

No. 08-727

Dear Mr. Patrick

The Court today entered the following order in the above entitled case.

The petition for a writ of certiorari is denied.

Sincerely,

// William K. Sutter, Clerk

To: SUPREME COURT OF THE UNITED

STATES

OFFICE OF THE CLERK

WASHINGTON, DC 20543-001

Feb 15, 2009

Mr. Lester Patrick
9522 Bismark Place
Stockton, Ca 95209

Re: Lester Patrick
v. Department of Veteran Affairs

No. 08-727

The certify that this motion for a rehearing is presented in good faith and not for delay, and addresses a new set of grounds for this case.

Sincerely,

Lester Patrick
2-15-09